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<b>1. REPORT DATE (DD-MM-YYYY)</b> 13-06-2017		<b>2. REPORT TYPE</b> Report/Paper			<b>3. DATES COVERED (From - To)</b> FY 2006-2016							
<b>4. TITLE AND SUBTITLE</b> Bid Protests on DoD Source Selections				<b>5a. CONTRACT NUMBER</b> n/a								
				<b>5b. GRANT NUMBER</b> n/a								
				<b>5c. PROGRAM ELEMENT NUMBER</b> n/a								
<b>6. AUTHOR(S)</b> Douglas J. Buettner and Philip S. Anton				<b>5d. PROJECT NUMBER</b> n/a								
				<b>5e. TASK NUMBER</b> n/a								
				<b>5f. WORK UNIT NUMBER</b> n/a								
<b>7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES)</b> Acquisition Policy Analysis Center, PARCA OUSD(AT&L) 3620 Defense Pentagon, Room 3C889A Washington, DC 20301-362020301-1155					<b>8. PERFORMING ORGANIZATION REPORT NUMBER</b>  n/a							
<b>9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)</b> OUSD(AT&L) 3620 Defense Pentagon, Room 3C889A Washington, DC 20301-3620					<b>10. SPONSOR/MONITOR'S ACRONYM(S)</b>  OUSD(AT&L)							
					<b>11. SPONSOR/MONITOR'S REPORT NUMBER(S)</b>  n/a							
<b>12. DISTRIBUTION/AVAILABILITY STATEMENT</b> Approved for public release; distribution unlimited												
<b>13. SUPPLEMENTARY NOTES</b> n/a												
<b>14. ABSTRACT</b> This white paper provides an update that includes the Fiscal Year 2016 trends and adds our new analysis of the GAO's binning of contract values. Unlike our prior analysis featured in the USD/AT&L's Performance of the Defense Acquisition System reports [Kendall 2016], this analysis only uses data provided directly by the GAO, and doesn't utilize bid protest statistics from other sources. We also fixed inconsistencies that we identified in the book keeping between filed and closed years and made an attempt to identify which GAO data field is being plotted, including a figure that plots the sustained protests by fiscal year filed and closed.												
<b>15. SUBJECT TERMS</b> acquisition, bid protests, protest values, Government Accountability Office												
<b>16. SECURITY CLASSIFICATION OF:</b> <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 33%; padding: 2px;">a. REPORT</td> <td style="width: 33%; padding: 2px;">b. ABSTRACT</td> <td style="width: 33%; padding: 2px;">c. THIS PAGE</td> </tr> <tr> <td style="text-align: center; padding: 2px;">U</td> <td style="text-align: center; padding: 2px;">U</td> <td style="text-align: center; padding: 2px;">U</td> </tr> </table>			a. REPORT	b. ABSTRACT	c. THIS PAGE	U	U	U	<b>17. LIMITATION OF ABSTRACT</b>  SAR		<b>18. NUMBER OF PAGES</b>  13	
a. REPORT	b. ABSTRACT	c. THIS PAGE										
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## 1. DOCUMENT DESCRIPTION

a. TYPE <div style="text-align: center;">Report/ Paper</div>	b. TITLE Bid Protests on DoD Source Selections
c. PAGE COUNT <div style="text-align: center;">10</div>	d. SUBJECT AREA Acquisition Policy Analysis

## 2. AUTHOR/SPEAKER

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## 3. PRESENTATION/PUBLICATION DATA (Date, Place, Event)

The paper is submitted for approval for public release as an unclassified, unlimited distribution document.

## 4. POINT OF CONTACT

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## 5. PRIOR COORDINATION

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## 6. REMARKS

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## **Bid Protests on DoD Source Selections**

**Douglas J. Buettner and Philip S. Anton**

**June 13, 2017**

**Acquisition Policy Analysis Center**  
**Performance Assessments and Root-Cause Analyses**  
**Office of the Under Secretary of Defense for**  
**Acquisition, Technology, and Logistics (AT&L)**  
**U.S. Department of Defense**

**17-S-1928**

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# **Bid Protests on DoD Source Selections**

**Douglas J. Buettner and Philip S. Anton**

**June 13, 2017**

## **SUMMARY**

The Office of the Secretary of Defense (OSD) Acquisition Technology & Logistics (AT&L) closely monitors the Government Accountability Office (GAO) Bid Protest statistics for trends. These statistics combined with our trend analysis provide an important independent assessment of how well our source selection process is working. When counting sustainment rates against all DoD solicitations (not just the number of protests), we find the rate to be about 0.02 percent.

This white paper provides an update that includes the Fiscal Year 2016 trends and adds our new analysis of the GAO's binning of contract values. Unlike our prior analysis featured in the USD/AT&L's Performance of the Defense Acquisition System reports [Kendall 2016], this analysis only uses data provided directly by the GAO, and doesn't utilize bid protest statistics from other sources. We also fixed inconsistencies that we identified in the book keeping between filed and closed years and made an attempt to identify which GAO data field is being plotted, and included Figure 6 that plots the sustained protests by fiscal year filed and closed.

To summarize the contents below, we found that GAO sustainment rates per solicitation over the number of bid protests for each fiscal year (closed)<sup>1</sup> remained statistically flat in both number and dollar value, with an increasing trend in protest rates (both in absolute numbers before 2010 and per budget dollar over recent years). Combined, these indicators do not appear to suggest a decline in the quality of DoD solicitations. Instead, the increasing protest rate per budget dollar seems to indicate an increased propensity by bidders to protest. GAO has sustained a few protests in very-large dollar value procurements, but these sustainments are infrequent and a recent increase in the last fiscal year is not statistically significant. Small numbers of very-large-value protests tend to drive the dollars under protest and total value of sustained protests.

<sup>1</sup> Our use of "GAO sustainment rate" or "sustainment rate" is the number of sustained protests per solicitation over the number of bid protests for each fiscal year (closed). This is a different rate than the GAO's "sustainment rate" which is the number of sustained protests per the number of merit cases over the number of bid protests for each fiscal year (closed). Our number is reflective of a GAO sustainment decision against our DoD bid solicitations.

## INTRODUCTION

A bid protest is a legal challenge to a procurement *action* (a solicitation or associated award) for the procurement of goods or services.<sup>2</sup> The GAO is a primary adjudicator of bid protests concerning Federal agencies and departments (including the DoD).<sup>3</sup> Once a protest is filed, the GAO has 100 days to issue a decision (31 U.S.C., Sec. 3554) or if the GAO decides to proceed under its express option procedures (under 4 CFR 21.9) it will render a decision in 65 days.

A protest can have one of four outcomes: it can be *withdrawn* by the protester at any time, *dismissed* by the GAO in its initial review, or *denied* or *sustained* by the GAO in its final decision.<sup>4</sup> Oftentimes, withdrawals and dismissals are a direct result of agency-initiated corrective action. In such an event, no clear understanding of the merits can be derived from the metrics. Final decisions (denials and sustainments) clearly indicate the merits of each case and are supported by separate decision documents. GAO's data tracks the outcome for each protest, the name of the protesting organization, the solicitation number, and the dollar range of the solicitation's value.

### Number and Value of Protests

Figure 1 shows the total number of protest cases received by the GAO for DoD and Federal non-defense actions by filing year.<sup>5</sup> The number of bid protests against DoD actions generally rose in mid-2000s, then leveled off at about 1,300 per year since FY 2010. The number of protests in FY 2016 dropped to the lowest level since FY 2009, but this followed a peak increase in FY 2015. The trend in non-defense protests generally mirrored defense protests but with a 1–2 year lag. As we saw in last year's report (USD[AT&L], 2016b), the number of protests by Component (or military service is not shown) has been relatively consistent since 2009, with somewhat of a drop for the Army in the last two years.

<sup>2</sup> Challenges include protests, cost claims, and requests for reconsideration. This report discusses protests only. The GAO reports case types by docket numbers (B-#) where the docket number aligns to a Federal or DoD Request for Proposal (RFP) or Request for Quote (RFQ) solicitation number and includes challenges other than "protests" (i.e., requests for reconsideration, entitlement, and claims for costs).

<sup>3</sup> Bid protests can also be handled by the procuring agency or the U.S. Court of Federal Claims. Thus, these data provide a view into a significant number of (but not all) bid protests.

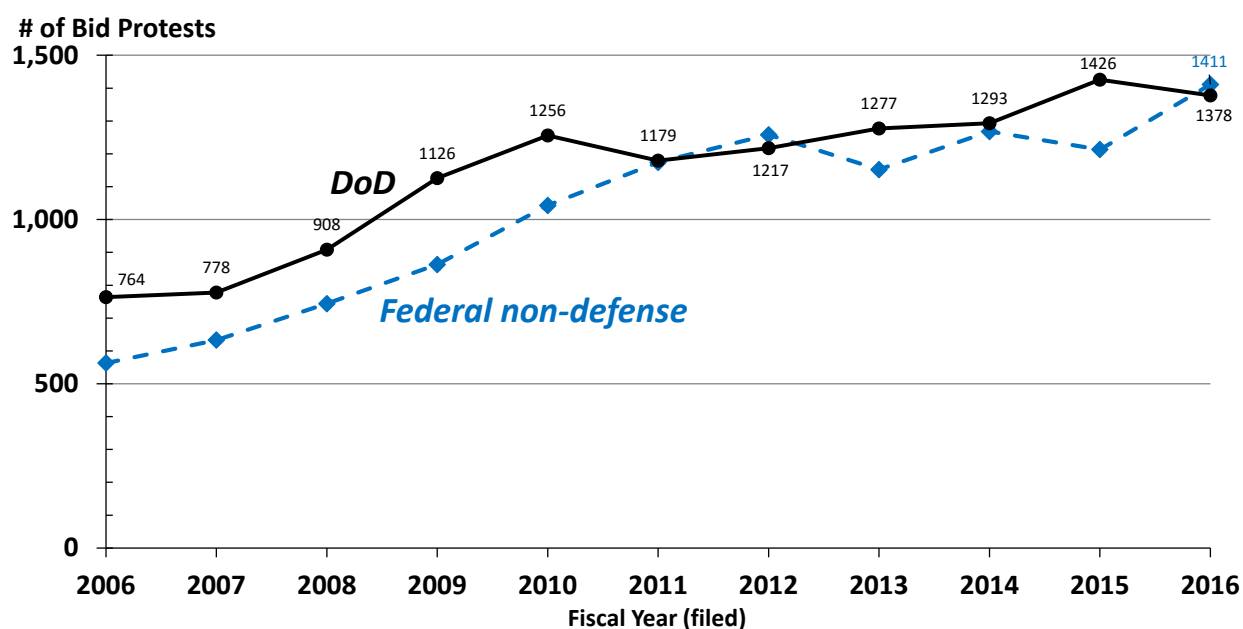
<sup>4</sup> Note that bid protests are an integral part of the government acquisition system to help ensure that all bidders are treated fairly and that solicitations and awards are conducted properly. There is no analogous bid protest process for commercial business transactions. Despite some limitations, the number of protests sustained by the GAO (independent of the number of protests) provides an indicator of the quality of the DoD's source selections. See <http://www.gao.gov/legal/bids/bidprotest.html> as well as Schwartz and Manuel (2015) for further information on the GAO process and timeline.

<sup>5</sup> In this annual report we distinguish between the years in which a protest was filed from the year in which a protest was closed; often these are the same—but not always. To accomplish this, we restrict our analysis to data received directly from the GAO as well as GAO's short annual reports to Congress. As a result, many of our plots only go back to FY 2006 in this annual report compared to prior reports, which included data from Schwartz and Manuel (2015); those data do not distinguish between filing and closure years.

When plotting the number of protests per DoD budget dollar (excluding military personnel), we find the protest rate per dollar has been rising steadily (see Figure 2). This rise is seen throughout these data and did not begin when DoD budgets began to decline in FY 2008. Using GAO's data on the dollar-value range for each protest,<sup>6</sup> we bound the minimum and maximum total value of the actions under protest for each year. Most protested actions were valued well below half a billion dollars; about a third were worth less than \$10 million and another third had unknown values (see Figure 3).

A few protests against very large procurements seem to be driving the increasing value of actions under protest. Figure 4 shows an increasing trend in the values of protested solicitations since FY 2006. If the three extremely large protests are removed, there was still a slight trend since FY 2006 but it disappears if measured since 2009. Also, if we remove the 23 large protests greater than \$3 billion, then there is no clear trend because of the uncertainty bounds in GAO's value data (see Figure 5).

**Figure 1. Number of Protest Received by GAO: DoD and Federal Non-DoD (FY 2006–2016)**

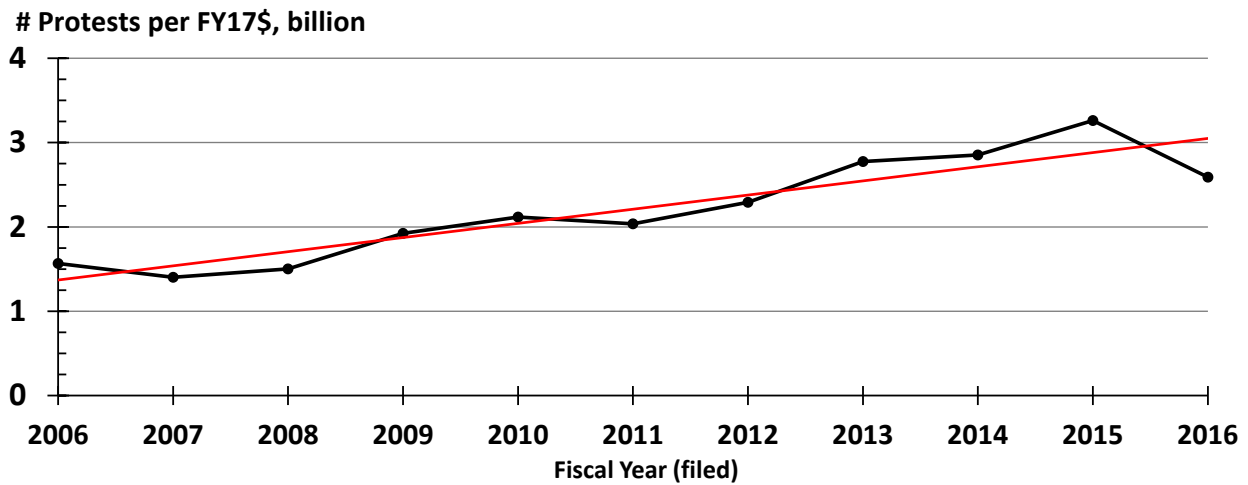


SOURCE: GAO

NOTE: The number of civilian cases in a fiscal year is derived from the GAO's Annual Reports and the GAO's provided database of DoD filings. Unlike versions in prior annual reports, this plot only shows data going back to FY 2006 when we can verify the counts in filing year.

<sup>6</sup> The GAO only provided values in ranges (e.g., greater than \$500 million but less than \$1B) or as an indicator (*micro-purchase* or *unknown*) for each solicitation. For protests over \$1 billion, we researched the value from FPDS-NG or FedBizOpps using the solicitation number. Micro-purchases were valued up to \$3,000 from FY 2006 to July of FY 2015; afterwards it was increased to \$3,500 (see FAR Subpart 13.2). The threshold is now, as result of legislation in FY 17 NDAA \$5,000, but this increase took place too late to affect the analysis here. We did not research the values of the large number (3,079) of unknown-valued protests, but only 20 were sustained and 244 were denied.

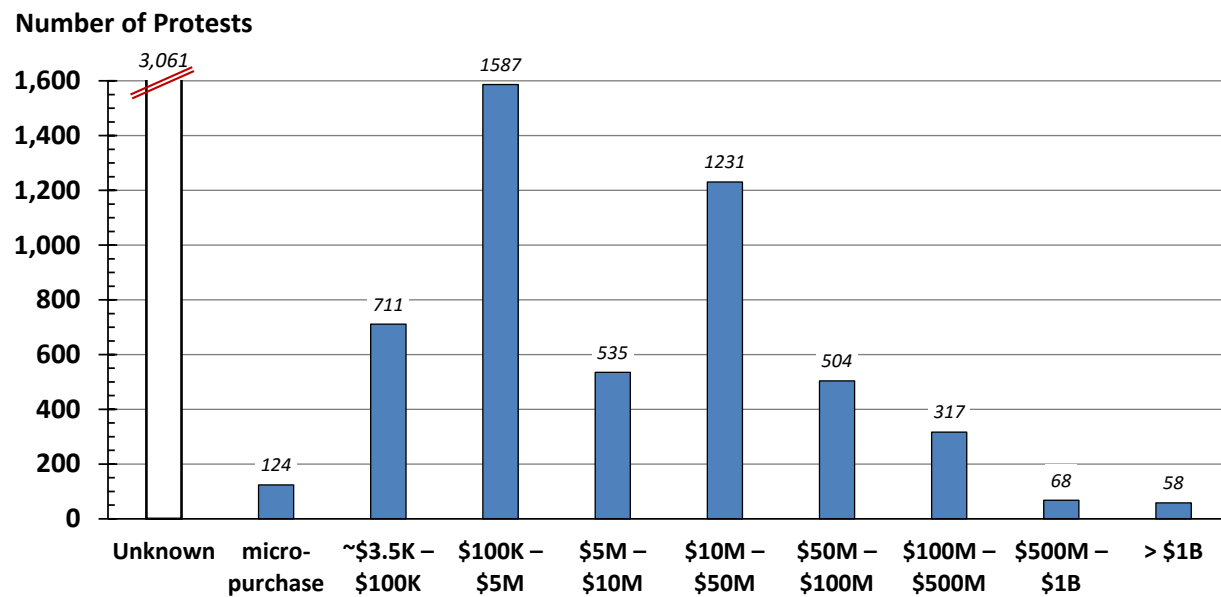
**Figure 2. Protests per DoD Budget Dollars (FY 2006–2016)**



Source: GAO; USD(C), 2016c (Green Book, Table 6-1).

NOTE: Annual budgets are DoD TOAs in constant FY17 dollars, excluding military personnel budgets. The upward trend is marked with a straight red line ( $R^2 = 84\%$ ).

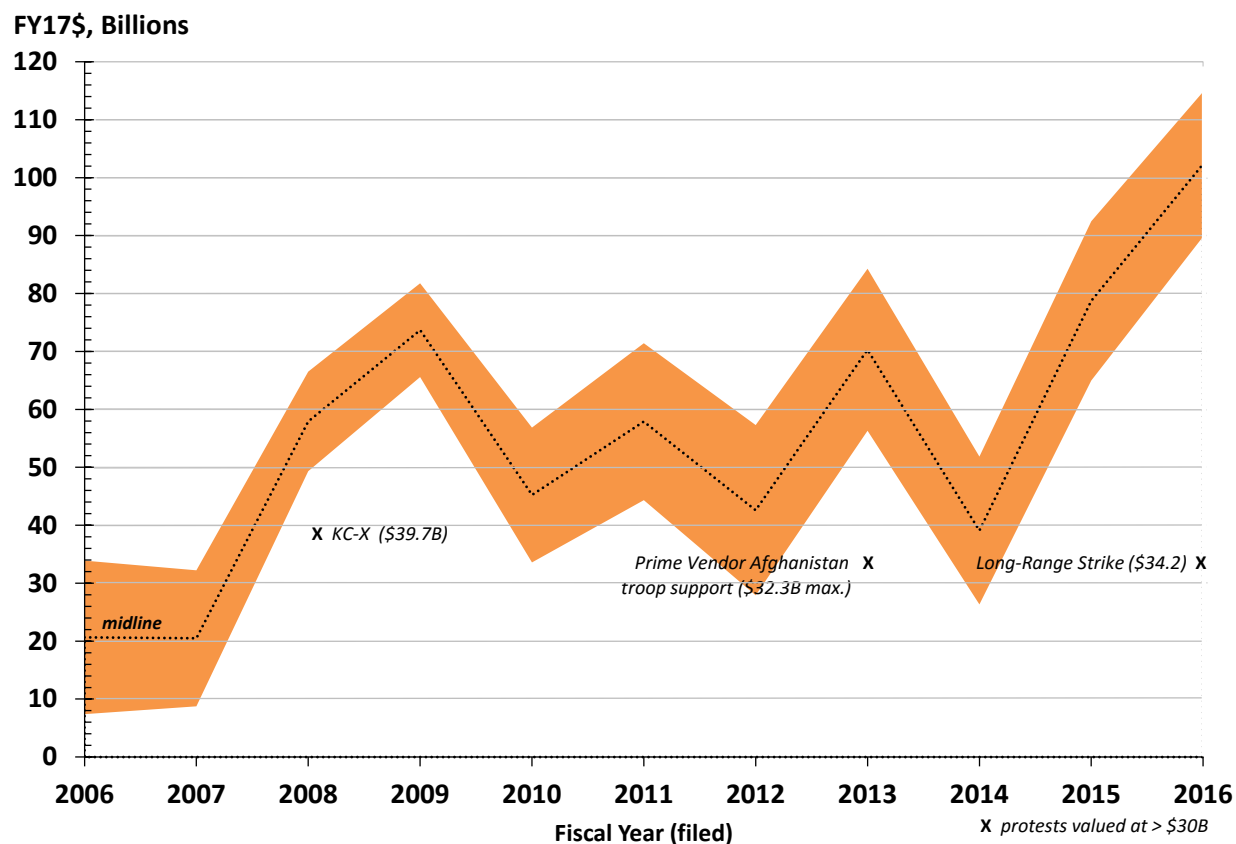
**Figure 3. Protested Solicitation Values (FY 2006–2016)**



Source: GAO

NOTE: N=8,196 protests. Micro-purchases were valued up to \$3,000 through July of FY 2015; afterwards it was \$3,500 (see FAR Subpart 13.2). GAO's bin values are not of equal or increasing ranges, which affects the profile.

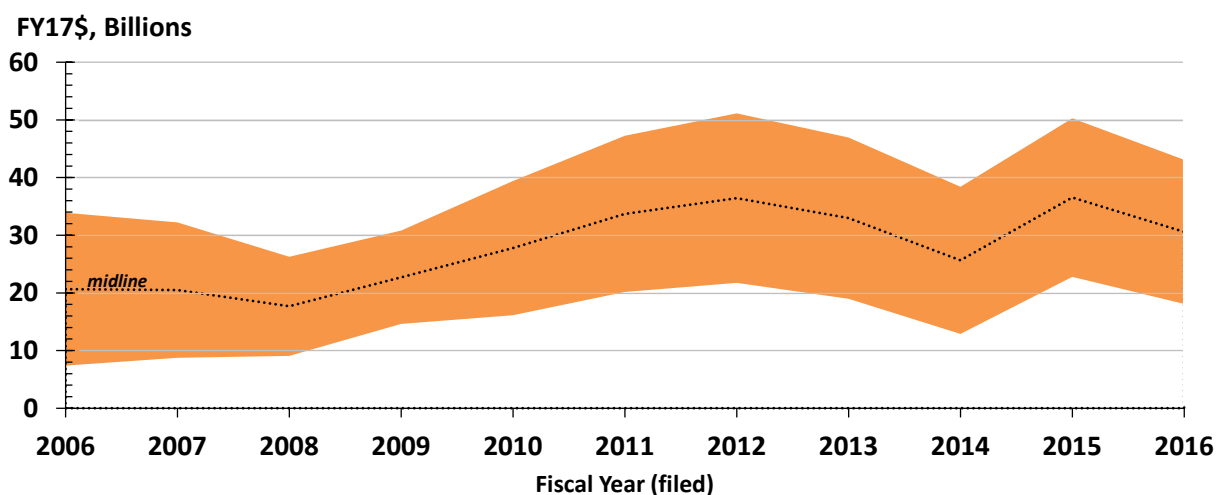
**Figure 4. All GAO Protested Contract Solicitation FY17\$ Value Totals per Fiscal Year (FY 2006–2016)**



Sources: GAO, FedBizOpps, FPDS-NG, and other sources.

NOTE: The three protests valued at over \$30 billion are plotted and included in the shaded band.

**Figure 5. All GAO Protested Contract Solicitation Value Totals per Fiscal Year Removing Protests with Values greater or equal to \$3 billion and Inflation (FY 2006–2016)**



Sources: GAO, FedBizOpps, FPDS-NG, Green Book Table 5-4, and other sources.

## Sustained Protests

Despite this increasing protest rate per dollar, the sustainment numbers and rates have remained relatively flat but for apparent outliers. There was an increase in sustainment protests closed in FY 2016, but when plotted by filing year<sup>7</sup> the recent pattern changed from an increase to a decrease (see Figure 6). There is no statistically significant trend since FY 2007 in either measure. When controlling for multiple protests on the same solicitation (not shown), the numbers drop from about 30 sustainments per year to about 15, but the increase in FY 2016 closures remain.

Sustainment rates have been declining somewhat and have been running at about 2 percent, except for the increase in FY 2016 (see Figure 7). These trends remain when removing multiple sustainments on the same solicitation (see the green dashed *Protested Solicitations* line on the plot). When counting sustainment rates against all DoD solicitations (not just the number of protests), we find similar trends but at about a hundredth the rate (about 0.02 percent; see the purple dashed *All Solicitations* line on the plot).

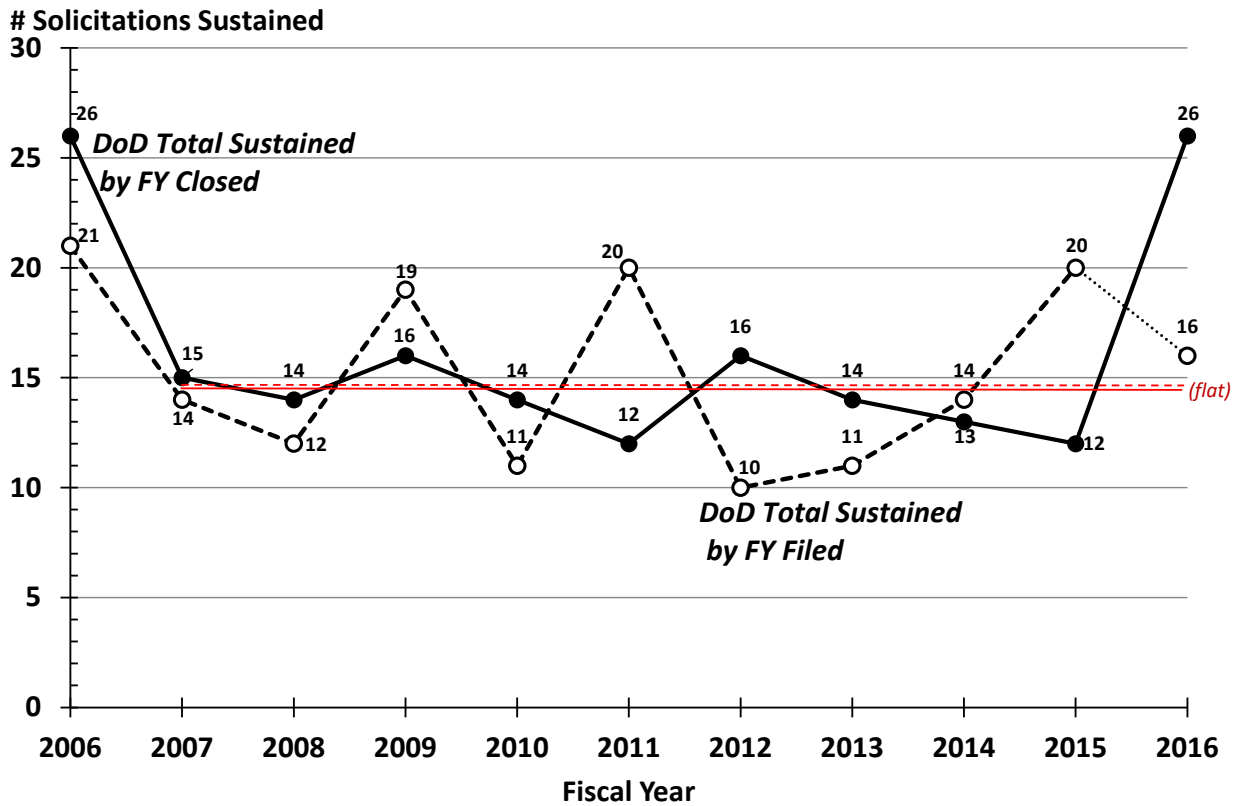
When measuring sustainments in dollar values, we again see that a few very-large sustainments dominate, especially the KC-X solicitation (now KC-46A program), two troop-support contracts (one for Kuwait, Iraq, and Jordan, and another for Afghanistan), and the Encore III information technology services contract (see Figure 8). When removing apparent outliers valued at over \$3 billion (FY17 dollars), we find that three sustainments<sup>8</sup> in FY 2015–2016 drove the recent upswing (see Figure 9).

Besides definitive sustainments, it would be useful to know the extent to which the DoD provides any accommodations or corrective actions (warranted and unwarranted) to help identify trends in the department's performance. Unfortunately, there is no central data collection within the DoD on such actions. The GAO does report Federal-wide rates of actions (regardless of whether they are warranted or not) in its annual reports on bid protests to Congress, but GAO does not track these actions by solicitation nor the overall rate for just the DoD. Still, if we assume that the DoD's "effectiveness" rate was the same as that reported for the entire Federal government (currently 46% of GAO filed protests in FY 2016), then about 1% of solicitations involved protests in which the agency made some kind of corrective action or accommodation to the bidder. We do not know what portion of these actions were warranted or the valuation profile for these actions as this data is not collected, but this extrapolation indicates that only a very small percentage of DoD solicitations may involve corrective actions (warranted or not).

<sup>7</sup> There is a differences between plotting by protest year and closure year since the GAO may receive protests in one fiscal year that are resolved in the following year.

<sup>8</sup> Solicitations for the Navy's Consolidated Afloat Networks and Enterprise Services (CANES), the Air Force's Arnold Engineering Development Complex's (AEDC) Test O&S, and the DoD Freight Transportation Service (DFTS).

**Figure 6. Number of Protested DoD Solicitations Sustained by GAO (FY 2006–2016)**



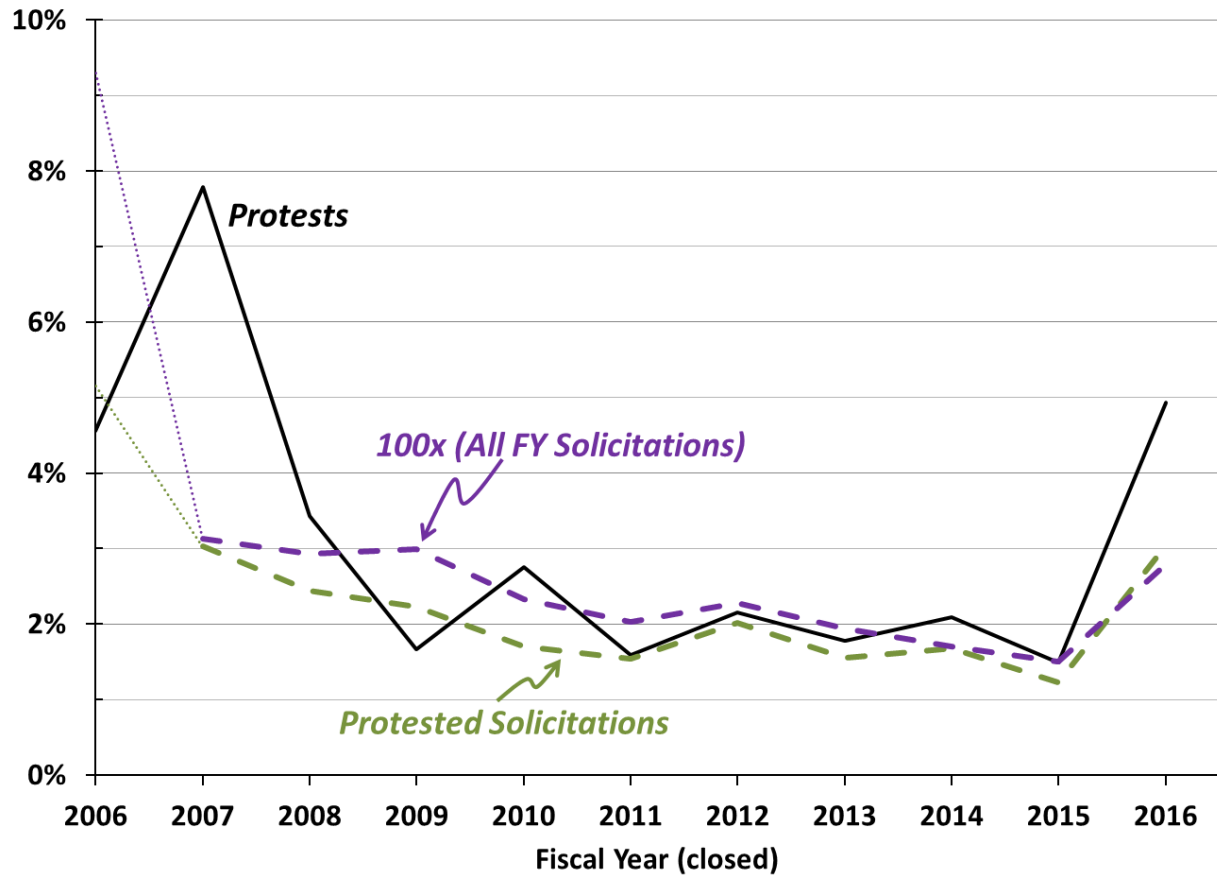
SOURCE: GAO

NOTE: These two lines are statistically flat (i.e., with an  $R^2$  of only 1–3% the trend lines would explain practically none of the variation seen). The FY 2016 value by filed date is incomplete.<sup>9</sup>

<sup>9</sup> Our GAO provided bid protest data only contains cases that were closed on or before the completion of FY 2016.

**Figure 7. GAO Protest and Solicitation Sustainment Rates (FY 2006–2016)**

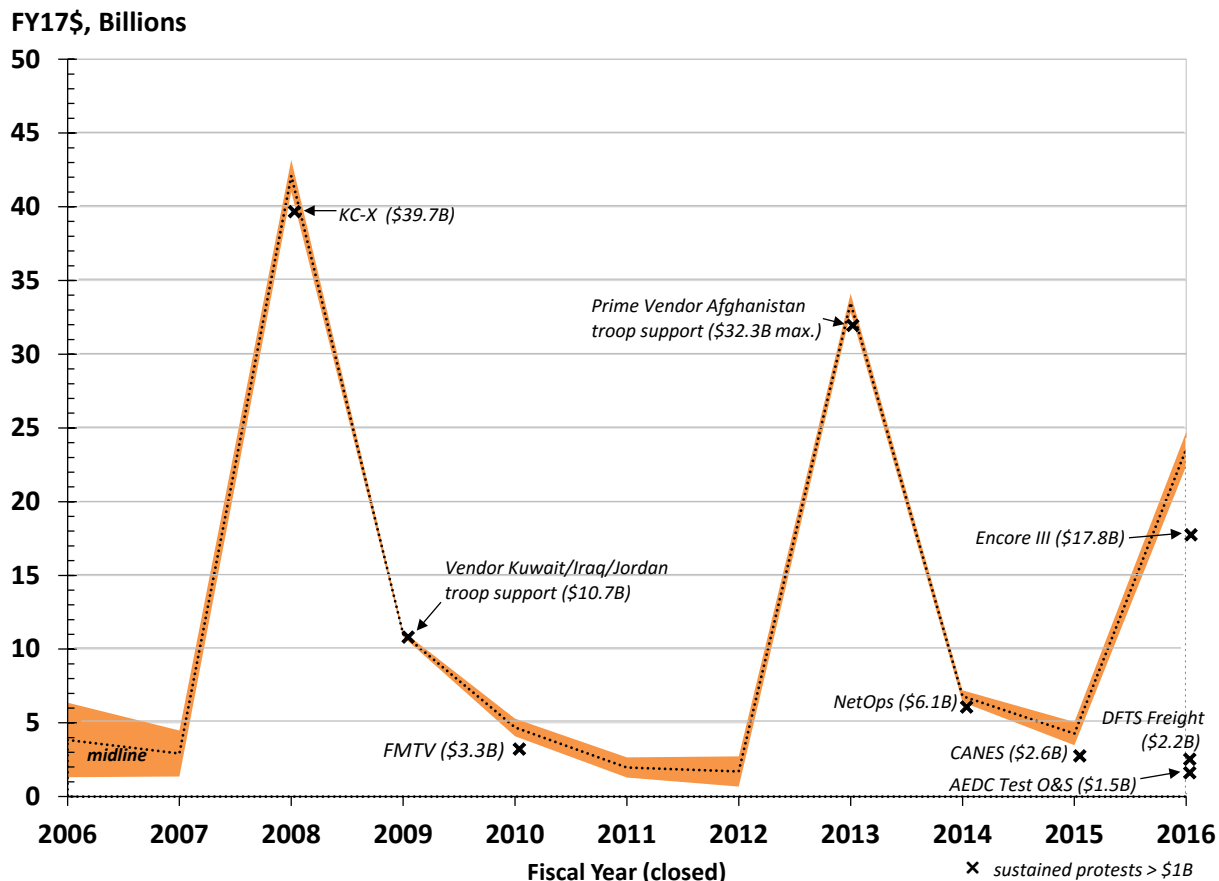
**Sustainment Rates**



Sources: GAO, FEDBizOps

NOTES: The *Protests* rate is the sustainment rate against the number of protests closed in the Fiscal Year. The *Protested Solicitations* rate is number of closed solicitations with at least one sustained protest against the number of protested solicitations. The *100x (All FY Solicitations)* rate is the number of sustainments (times 100 in order to plot it on the same scale as the other rates) against the number of all solicitations (protested or not). The FY 2006 values for the last two measures may be affected by initial data collection, so those apparent drops may not be reliable. In FY 2009 the number of sustained protests was less than the number of sustained solicitations (16 versus 18), but in percentage the rate of protested solicitations was higher because there were many more protest cases than protested solicitations.

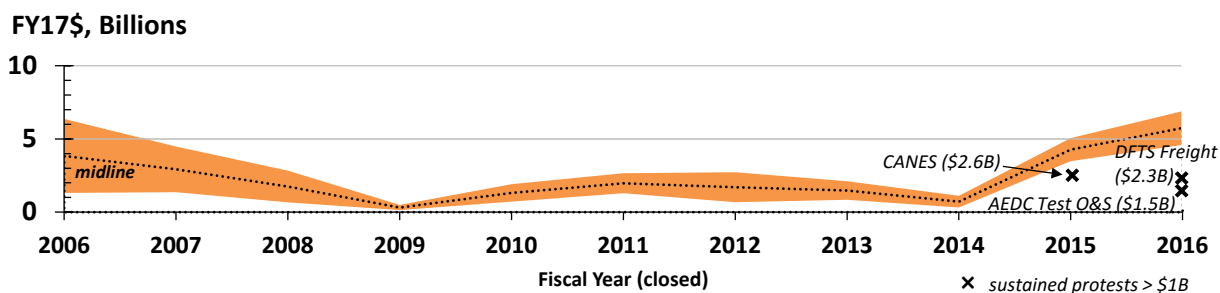
**Figure 8. Total Value of Sustained Protests (FY 2006–2016)**



Source: GAO

NOTE: The sustained protests that drove the spikes are show with X's; they include six sustained protests valued at over \$3 billion and three recent protests valued at over \$1.5 billion, all of which are included in the shaded band.

**Figure 9. Total Value of Sustained Protests Worth Less Than \$3 Billion (FY 2006–2016)**



Source: GAO

NOTE: The three recent sustained protests valued at over \$1.5 billion are plotted and included in the shaded band.

## References

- 31 U.S.C., Sec. 3554 – Decisions on Protests, found online at:  
<https://www.gpo.gov/fdsys/granule/USCODE-2010-title31/USCODE-2010-title31-subtitleIII-chap35-subchapV-sec3554/content-detail.html>
- Frank Kendall, Performance of the Defense Acquisition System 2016 Annual Report, found online at: <http://www.acq.osd.mil/fo/docs/Performance-of-Defense-Acquisition-System-2016.pdf>